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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 236

GULF REFINING COMPANY,
Petitioner,

versus

ISAAC R. PRICE, ET AL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

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ISAAC R. PRICE, ET AL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Gulf Refining Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on April 6, 1956, wherein a rehearing was denied on May 17, 1956.

I.

CITATIONS TO OPINIONS BELOW

The District Court gave judgment on a motion for summary judgment without opinion (R. 50). The opinion of the Circuit Court of Appeals (R. 87) printed in Ap-

pendix "A" hereto, *infra*, p. 15, *et seq.* is reported in 232 F. 2d 25.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on April 6, 1956 (R. 87). A petition for rehearing, timely filed by petitioner, was denied on May 17, 1956 (R. 110).

The jurisdiction of this Court to review this case on certiorari is invoked under 28 U.S.C., Section 1254(1).

III.

QUESTIONS PRESENTED

1. After a petitory action [1] has been filed against the lessee alone, can the Court of Appeals properly hold that the termination of the lease eliminates the necessity of joining the lessor as an indispensable party?

2. Can the Court of Appeals properly hold that the character of petitioner's possession as lessee **changed**, solely as a result of the termination of the lease after the action was filed, when local law forbids a lessee to change the character of his possession even though his possession continues beyond the termination of the lease?

3. Can the Court of Appeals modify and affirm a **summary judgment** by finding as a fact that the char-

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[1] "A 'petitory action' has been judicially defined as one brought by the alleged owner of real estate out of possession against a party whom he admits to be in possession in order to have contradictorily with such person his ownership recognized and decreed. Ramos Lumber & Mfg. Co. v. Labare, 116 La. 559, 40 S. 898, 902.

* * * * *

"A petitory action has for its purpose not only the establishment of title by the owner out of possession but through court decree the obtaining of possession."

Lawrence v. Sun Oil Company, CCA 5th, 166 F. 2d 466, 470.

acter of petitioner's possession as lessee changed, upon the termination of the lease after the action was filed, **when such issue was not presented or argued by the litigants or considered by the Trial Court, and where petitioner had no occasion or opportunity to introduce evidence relative thereto?**

4. In a petitory action where jurisdiction is invoked solely on the basis of diversity, can a Federal Court properly enter a judgment decreeing that plaintiffs have title to property which is admittedly covered by navigable waters, when local law provides that the State, as a Sovereignty, is vested with the ownership of the beds of all navigable waters?

IV.

STATUTES INVOLVED

This case involves the following Statutes:

Louisiana Civil Code Article 3433:

> "One may possess a thing not only by one's self, but also by other persons.
>
> "Thus the proprietor of a house or other tenement possesses by his tenant, or by his farmer; the minor, by his tutor; and, in general, every proprietor, by the persons who hold the thing in his name."

Louisiana Civil Code Article 3441:

> "Those who possess, not for themselves, but in the name of another, as farmers, depositaries and others who acknowledge an owner, can not acquire the legal possession, because, at the commencement of their possession, they had not the intention of possession for themselves but for another."

Louisiana Civil Code Article 3446:

"Even if a person who commenced his possession of an estate for another, should entertain the intention of no longer holding for that other, but for himself, yet shall he still be presumed to hold possession for the person for whom he originally took it."

Louisiana Civil Code Article 3489:

"When a person's possession commenced for another, it is supposed to continue always under the same title, unless there be proof to the contrary."

Article 43 of the Louisiana Code of Practice:

"**Parties defendant-Lessee's duty to declare name of lessor.**—The petitory action, or one by which real property, or any immovable right to such property may be subjected, is claimed, must be brought against the person who is in the actual possession of the immovable, even if the person having the possession be only the farmer or lessee.

"But if the farmer or lessee of a real estate be sued for that cause of action, he must declare to the plaintiff the name and the residence of his lessor, who shall be made a party to the suit, if he reside in the State, or is represented therein, and who must defend it in the place of the tenant, who shall be discharged from the suit."

Rule 56(c) of the Federal Rules of Civil Procedure: (28 U.S.C.)

"Rule 56. Summary Judgment.

"(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and ad-

missions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, effective March 19, 1948."

V.

STATEMENT

Invoking the jurisdiction of the District Court on the basis of diversity (R. 23), respondents (herein sometimes called "plaintiffs") filed this petitory action (R. 26, also Court's opinion, February 2, 1956, Appendix "B", page 27, *infra*) against petitioner alone, claiming ownership of 6439.29 acres of land[2] in Township 19 South, Range 18 East in Louisiana (R. 3) and alleged petitioner was " * * * in the actual, physical possession of the * * * property * * * without any title * * * and without any rights to remain on said property * * * and "that part of defendant's illegal possession consists of the drilling of oil wells on these lands * * * " (R. 6). Plaintiffs prayed for judgment recognizing them as " * * * owners of said property and, as such, entitled to the full and undisturbed possession thereof and ordering said Gulf Refining Company to deliver possession * * * " to them (R. 7).

In its answer petitioner averred that such possession as it had exercised over the property had been in the capacity of a lessee under Louisiana State Lease No. 195 (R. 10) and attached a certified copy of the instrument

[2] Admittedly covered by navigable waters—Court's opinion of April 6, 1956, 232 F. 2d. 25, 26, Appendix "A", page 16, *infra*.

showing its acquisition of State Lease No. 195 from Southern Sulphur Corporation (R. 11-F). Petitioner also attached to its answer a certified copy of a release dated July 8, 1954 to the successors in title of Southern Sulphur Corporation of " * * * all rights, titles and interest acquired or held by it under said State Lease No. 195 in so far as said lease covers and relates to any part of * * * Section 22 and Section 27 in Township 19 South, Range 18 East" (R. 11-Kk).

On August 24, 1954, plaintiffs filed a Motion for Summary Judgment on the grounds that petitioner had not denied their title (R. 12). On August 31, 1954, plaintiffs filed the following documents [2a] in support of their Motion for Summary Judgment: (1) copy of State Patent No. 1965 dated November 4, 1874 to their ancestor-in-title, (2) copy of a plat of survey of 1874 by L. N. Polk, referred to in Patent No. 1965, and (3) copy of a plat of survey of 1939 by John C. DeArmas (R. 15).

On September 8, 1956, petitioner filed a Motion to Dismiss on the grounds that such possession as it had exercised over portions of Sections 22 and 27 had been in the capacity of a lessee, as disclosed by its answer, and that it had disclosed the name and identity of its lessor and "that under the law of Louisiana defendant's lessor is an indispensable party to this suit in so far as questions of title are concerned, and, further, under the law of Louisiana plaintiffs are required to make such lessor a party to the suit, or have the suit dismissed" (R. 18).

Petitioner also filed an Opposition to Motion by Plaintiffs for Summary Judgment, the portions thereof

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[2a] These documents have been sent up in original form and therefore are not included in the printed record.

pertinent to this application being: (R. 20, 21)

> The record "affirmatively shows an indispensable party has not been joined";
>
> The record did not "disclose a justiciable controversy as to the ownership of the property"; and
>
> There being genuine issues of material fact a Motion for Summary Judgment was not authorized by Rule 56 of the Federal Rules of Civil Procedure.

At the trial on the Motion for Summary Judgment September 15, 1954, plaintiffs filed the following documents:

(1) Affidavit [3] by Richard F. Price dated August 10, 1954, describing three structures in the waters of Grand Bay and located in Sections 22 and 27, two bearing signs identifying them as "Gulf Refining Company La. State QQ Lse 195 Well No. 3 Sec. 22 T19S R18E" and "Gulf Refining Company La. State QQ Lse 195 Well No. 4 Sec. 22 T19S R18E" and a third structure comprised of two clusters of piling, being approximately 100 feet long by 25 feet wide, on which were red lights but bore no signs of identifcation; [4]

(2) Affidavit [3] by Richard F. Price dated August 17, 1954, that the value of the property in controversy exceeded $3,000.00;

(3) Affidavit [3] by Peter A. Huth dated August 10, 1954, that neither Wells 3 nor 4 on State Lease No. 195, which embraces Sections 22 and 27, had been plugged and abandoned;

(4) Certificate [3] dated August 13, 1954 by T. M.

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[3] These documents have been sent up in original form and therefore are not included in the original record. Court's opinion of April 6, 1956, footnote 3, 232 F. 2d 27, Appendix "A", pages 18-19, *infra*.

[4] The Court is in error in stating the affidavit described four structures—affidavit of Richard F. Price of August 10, 1954.

Winfiele, Chief Engineer, Louisiana Department of Conservation, listing reports and attaching copies filed by Gulf Refining Company through December for each of the years 1951, 1952 and 1953, this suit having been filed on June 17, 1954; [5]

(5) A "relinquishment" or "quitclaim" [3] to the State by the Successors in title to Southern Sulphur Corporation of "all of their rights whatsoever in Sections 22 and 27, Township 19 South, Range 18 East," dated July 23, 1954.

After hearing plaintiffs' Motion for Summary Judgment and petitioner's Opposition thereto and Motion to Dismiss, the District Court rendered judgment on May 28, 1955, without written opinion " * * * in favor of plaintiffs and against defendant **recognizing plaintiffs to be the owners of the lands described in plaintiffs' complaint** and removing and annulling as against defendant, Gulf Refining Company, any claims or pretensions in and to any portions of said lands adverse to plaintiffs' title" (R. 50). (Emphasis supplied)

The judgment of the District Court was affirmed by the Court of Appeals on February 2, 1956, with reasons (R. 56) which has not been published in the reports, and for convenience is printed herein as Appendix "B", page 27, *infra*.

A Petition for Rehearing, timely filed by petitioner, was granted on April 6, 1956 (R. 86) and on the same day the Court of Appeals entered a second judgment, with reasons, 232 F. 2d 25 (R. 87), annexed hereto for convenience as Appendix "A", page 15, *infra*, without referring to its judgment and opinion of February 2,

[5] The Court is in error in including December 1954—the case was tried September 15, 1954.

1956, modifying and affirming the District Court's judgment by holding that plaintiffs had proved a "prima facie" title to Sections 22 and 27 **only** of the 6439.29 acres sued on, and assigning different reasons from those in its opinion of February 2, 1956.

Petitioner filed a Petition for Rehearing on the opinion and decree of April 6, 1956, which was denied on May 17, 1956, without written opinion (R. 110).

VI.

REASONS FOR GRANTING THE WRIT

Petitioner assigns as reasons for granting the writ of certiorari, the following:

1.

(A) The decision of the Court of Appeals in the instant case, holding that the lessor-lessee relationship terminated after the action was filed, thereby eliminating the lessor as an indispensable party, is directly in conflict on a question of Federal law with the decision of the Circuit Court of Appeals for the 9th Circuit in the case of *State of Washington v. United States*, 87 F. 2d 421, holding that where the reversionary interest of a lessor is effected by a decree, then the lessor is an indispensable party. It is recognized the instant case differs from *State of Washington v. United States, supra*, only in that the latter case involved no question of the lease terminating after the action was filed, which is of no importance as respects the principles applicable. The same legal principles pronounced and applied by the Court in *State of Washington v. United States, supra*, are equally applicable in the instant case and for identical reasons. The test of the lessor's indispensability is determined by the **effect**

the decree will have on his **right of possession** and not by the time the lease terminates after the action is filed. *Shields v. Barrow*, 17 How. 130, 139, 15 L. Ed. 158; *Lawrence v. Sun Oil Company*, CCA 5th, 166 F. 2d 466, 469.

(B) There is here presented for decision a question of importance as to the proper application of the Federal law as to the indispensability of parties which has not been, but should be, settled by this Court, for the decree of the Court of Appeals in this case makes a determination of the indispensability of the lessor, dependent upon whether or not the contractual relationship of lessor-lessee continues or terminates after the action is filed.

2.

The decision of the Court of Appeals in the instant case decreeing plaintiffs to be owners of property against petitioner, admittedly a lessee at the time the action was filed, is directly in conflict with the applicable local law that:

> (a) a plaintiff in a petitory action cannot be decreed the owner of property against a lessee, but upon disclosure of the identity of the lessor, the lessor must be joined, and the action, as against the lessee, dismissed;
>
> *Louisiana Code of Practice Article 43;*[6]
> *Byrne v. Hebert*, 51 La. Ann. 548, 25 So. 586;
> *Cutno v. Weil Bros.*, 127 La. 701, 53 So. 962;
> *Terrett v. Brossett* (La. App.) 34 So. 2d 671;
> *Lawrence v. Sun Oil Company*, CCA 5th, 166 F. 2d 466, 470.
>
> (b) the possession of the lessee is the possession of the lessor and the lessee cannot change the character of his possession as a lessee, by pos-

[6] See page 4, *supra*.

sessing by himself, **even if he be the actual owner of the property;**

a lessee is estopped to acknowledge anyone other than the lessor as owner, or to deny his lessor's right to possession of the property at the termination of the lease; and

a lessee is prevented from changing the character of his possession, even though such possession continues beyond the termination of the lease;[7]

Louisiana Civil Code Articles 3433,[8] *3441,*[9] *3446,*[10] *3489,*[11]
Davidson v. Fletcher, 130 La. 668, 58 So. 504;
Campbell v. Hart, 118 La. 871, 881, 43 So. 533;
Moulierre v. Coco, 116 La. 845, 41 So. 113;
Harvin v. Blackman, 112 La. 24, 36 So. 213;
Byrne v. Hebert, 51 La. Ann. 548, 25 So. 586.

thus affording plaintiffs a remedy which they could not obtain in the State Courts contrary to the holding of this Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

3.

In modifying and affirming the **summary judgment,** by holding that the character of petitioner's possession as lessee changed, and thereafter lessee commenced possessing adversely to its lessor, the Court of Appeals had to find as a fact that after the action was filed:

(a) petitioner manifested, by some unequivocal act, incompatable with the lessor-lessee relationship, the intention to commence possessing adversely to its former lessor, and such intentionally hostile act was brought to the knowledge of the lessor, *Cortinas v. Peters*, 224 La. 9, 68 So. 739, **or,**

[7] See 3, *infra*, pages 11-14, for the limited exception to this rule.
[8] See page 3, *supra*.
[9] See page 3, *supra*.
[10] See page 4, *supra*.
[11] See page 4, *supra*.

(b) petitioner **surrendered possession** to the lessor, and thereafter re-entered **with the proclaimed intention to possess adversely** to its former lessor, *Cortinas v. Peters*, 224 La. 9, 68 So. 2d 739.

when neither of these issues was presented or argued by the litigants or considered by the Trial Court and petitioner never had an occasion or opportunity to produce evidence pertaining thereto.

In its opinion and decree of February 2, 1956 (Appendix "B", page 27, *infra*) the Court of Appeals affirmed **without modification** the trial Court's judgment that plaintiffs were owners of the **entire 6439.29 acres** on the ground that, **although petitioner was a lessee,** plaintiffs were confronted with the "impossible situation" (Court's opinion, page 35, *infra*) of being unable to sue the lessor (State of Louisiana) and, thus, were entitled to judgment against petitioner without the joinder of the State. There was no finding of fact or intimation in the Court's opinion of February 2, 1956, that petitioner was possessing Sections 22 and 27 (or, indeed, any portion of the 6439.29 acres) **adversely to the State of Louisiana.** However, in its opinion and decree of April 6, 1956, the Court held that the lease had terminated after the action was filed, and modified the Trial Court's summary judgment by **limiting it to Sections 22 and 27,** thus necessarily holding that petitioner was in possession of said property adversely to its former lessor. The record demonstrates that the issue of whether petitioner commenced possession adversely to its lessor after the action was filed, was not considered by the Trial Court (since it decreed plaintiffs the owners of the entire 6439.29 acres) and the point was not presented or argued by the litigants either in the Trial Court or the Court of Appeals. Thus, the

Court of Appeals, in modifying and affirming the **summary judgment** on a finding of fact that the character of petitioner's possession as lessee changed, when such issue was not presented by the litgants or considered by the Trial Court, and petitioner never had an occasion or an opportunity to introduce evidence bearing thereon, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. *Letulle v. Scofield*, 308 U.S. 415, 84 L. Ed. 355.

4.

(a) The decree of the Court of Appeals in the instant case that plaintiffs have title to land, admittedly covered by navigable waters,[12] is contrary to applicable local law that:

> " * * * It is the rule of property and of title in this State, and also a rule of public policy that the state, as a sovereignty, holds title to the beds of the navigable bodies of water." *Miami Corporation v. State*, 186 La. 784, 173 So. 315;

and thus affords plaintiffs a remedy which they could not obtain in the State Courts, contrary to the holding of this Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

(b) The decree in the instant case recognizing that plaintiffs have title to land, admittedly covered by navigable waters,[12] is in conflict with the applicable local law, that the showing that there is an outstanding title in a third person (the State being vested with title to the beds of all navigable waters) is a sufficient defense to a petitory action. *Soule v. West*, 185 La. 655, 170 So. 26;

[12] Court's opinion of April 6, 1956, 232 F. 2d 25, 26, Appendix "A", page 16, *infra*.

City of Shreveport v. Marks, 117 La. 143, 41 So. 444; it being a cardinal rule that in a petitory action a plaintiff must recover upon the strength of his asserted title and not upon the weakness of defendant's. *Pringle v. Price*, 170 La. 343, 127 So. 745.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

.....

ARCHIE D. GRAY,

.....

MELVIN EVANS,
Counsel for Petitioner.

CERTIFICATE

This certifies that copies of this petition have been served on counsel for Isaac R. Price, et al, Respondents, by depositing the same in the United States Post Office, New Orleans, Louisiana, with first class postage, prepaid, addressed to Mr. Cullen R. Liskow, Pioneer Building, Lake Charles, and Messrs. Donold W. and Roger H. Doyle, The California Company Building, New Orleans, Louisiana, on July ....., 1956.

.....

Counsel for Petitioner.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15622

GULF REFINING COMPANY,
Appellant,

versus

ISAAC R. PRICE, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(April 6, 1956)

Before BORAH and JONES, Circuit Judges, and DAWKINS, SR., District Judge.

DAWKINS, District Judge: Appellees, plaintiffs below, some fourteen in number alleging themselves to be residents of Louisiana, Illinois, Iowa and California brought this action claiming title to several hundred acres of property,[1] in the Parish of Plaquemines, Louisi-

[1] "Lot 1 of Section 1, Lot 1 of Section 2, Lot 1 of Section 3, Lot or Section 5, Lot 1 of Section 6, Lot 1 of Section 7 and Lot 1 of Section 8, all of Sections 14 and 15, Lots 2, 3 and 4 of Section 17, South Half of Section 18, all of Sections 19, 20, 21, 22, 23, 24 and 25, North Half of North Half of Section 26, Northwest Quarter of Northeast Quarter, Northwest Quarter of Southwest Quarter and Northwest Quarter of Section 27, all of Sections 28, 29, 30 and 32, Northwest Quarter of Northeast Quarter, Northwest Quarter of Southwest Quarter and Northwest Quarter of Section 33 in Township 19 South, Range 18 East in the Southeastern Land District of Louisiana, east of the Mississippi River."

ana against Gulf Refining Company, appellant, a Delaware Corporation called Gulf. They alleged actual possession by defendant for more than one year, as required by the provisions of the Louisiana Code of Practice dealing with real actions (Articles 5 and 43) and that the value of the property in controversy exceeded the minimum jurisdiction of the court. Their claim of ownership was as "x x x sole and only heirs" of John Beckwith to whom plaintiffs alleged the State had issued patent No. 1965 on November 4, 1874, covering a larger area of several thousand acres belonging to the State at that time by virtue of its inherent sovereignty (beds of navigable bodies of water) when admitted to the Union in 1812. Petitioners prayed for judgment "recognizing petitioners as the true and lawful owners of said property and, as such, entitled to the full and undisturbed possession thereof and ordering said Gulf Refining Company to deliver possession of said property to petitioners."

On July 9th following, defendant, appellant, answered denying for want of information, the citizenship of plaintiffs, but admitting it was a corporation under the laws of Delaware. It also denied the value of the property was within the Court's jurisdiction. It responded to other articles of the complaint as follows: That Article IV alleging title in plaintiffs through the patent to Beckwith duly recorded in the conveyance records, stated only a conclusion of law, which defendant would neither admit nor deny. It then admitted Articles V through XII, wherein plaintiffs' relation to an acquisition under the Beckwith patent, as well as other alleged transfers were recited, but denied possession in itself of the property as charged in Articles XIII and XIV. Defendant then set forth at length its reasons for denial of

possession[2] based mainly upon its alleged release of all rights it had formerly held in Section 22 and 27 as lessee.

Defendant then denied "it has at any time been in *illegal* possession of any portion of Sections 22 and 27, Township 19 South, Range 18 East, Plaquemines Parish, Louisiana", (Emphasis Added) but admitted,

> "x x x it has drilled wells in search of oil on said sections, which wells had been abandoned long prior to the filing of this action, and defendant has exercised no possession over said property since such abandonment." It also averred "x x x *It is not in possession of any portions of Sections 22 and 27, Township 19 South, Range 18 East, Plaquemines Parish, Louisiana, and that it has no interest in said property and is not claiming possession thereof or any interest thereon; and defendant formally disclaims any right to possession of said property or any interest therein. (Emphasis Supplied)*

Copies of "Defendant-1", "Defendant-2" and "Defendant-3" referred to in answer to Article XIII of the

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[2] "XIII. The allegations contained in Article XIII of plaintiffs' petition are denied and in this connection defendant shows that it is not in actual physical possession of any portion of Sections 22 and 27, of Township 19 South, Range 18 East, Plaquemines Parish, Louisiana; that it acquired a mineral lease designated as State Lease #195 from Southern Sulphur Corporation by instrument dated September 18, 1936, a certified copy of which instrument is attached hereto and marked 'Defendant-1', which instrument conveys the rights of Southern Sulphur Corporation in *Sections 22 and 27 aforesaid, among other property*: that the successors in interest to Southern Sulphur Corporation are Mrs. Bessie Franzheim, et al, being the transferees in instrument dated November 17, 1953, certified copy of which is attached hereto and marked 'Defendant-2'; that pursuant to the provisions contained in the instrument hereinabove designated as 'Defendant-1' and particularly paragraph VI thereof, defendant has executed a reconveyance of all rights acquired by it under said instrument to the successors in interest of Southern Sulphur Corporation, as they appear from the instrument herein described as 'Defendant-2' and the heirs, successors and assigns of such parties, as more fully appears from instrument dated July 6, 1954, a certified copy of which is attached hereto and marked 'Defendant-3', such reconveyance being limited to the rights acquired by this defendant as aforesaid in Sections 22 and 27 of Township 19 South, Range 18 East, Plaquemines Parish, Louisiana." (Emphasis Supplied)

Complaint (Footnote #2) were attached and constitute a considerable portion of the transcript in this case.

On August 24, 1954, plaintiffs moved for summary judgment, contending there was "no genuine issue as to any material fact, all as shown by affidavits and documents hereto attached" [3] and prayed for judgment as demanded in its original complaint.

Thereafter, on September 8, 1954, Defendant moved to dismiss the motion for summary judgment, again averring as in its answer of July 9, that "x x x such possession as defendant has had of the property in controversy has been in the capacity of lessee, and defendant in

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[3] The proof offered was a certified photostat of the patent to Beckwith dated November 4, 1874 under which plaintiffs claimed, conveying among other lands Sections 22 and 27 of Township 19, South, Range 18 East; (2) affidavit of plaintiff, Richard F. Price that on July 28, 1954 he made a personal inspection of Sections 22 and 27 involved here and found three structures thereon, No. 1 on Section 22, consisting of the usual supports for a producing oil well, on which there was a sign having a white back ground with the following in black letters: "Gulf Refining Company La. State QQ Lse. 195 Well No. 3, Sec., 22, T 19S, R 18E Serial No. 44862"; that within this structure the casing of a well protruded from the surface of the water and was topped by a "Christmas Tree"; that a second structure similar in all material respects to the first, "in a circular pattern" was found also on Section 22, designated as Well No. 4, both well casings protruding above a platform also topped by a "Christmas Tree" and bearing the "Serial No. 45232", the second structure "having a flashing red light" on top thereof; the third structure was similar to 1 and 2 and the fourth measuring approximately 100 feet long by 25 feet wide consisted of two clusters each also having red lights and a small wooden shack, a wooden platform with iron braces on four sides and a wooden platform on top eight to ten feet above the surface of the water.

In a second affidavit dated August 17, 1954 the same affiant swore he was the owner of an undivided interest in the fee title of Sections 22 and 27 and was the lessee under a mineral lease thereon; that a portion of said land had been assigned to the California Company for $30.00 per acre who had since drilled fifteen producing wells thereon; that the land to which the plaintiffs in present suit are asserting title comprises approximately one thousand acres; that affiant had examined the records in the Conservation Office of the State, which showed monthly reports by defendant, copies of which were annexed showing 74,000 barrels of oil had been withdrawn since May 25, 1951 by the Gulf Refining Company; and finally that a .017708 interest "in this identical property" had been appraised in a suit in the State Court at $16,000.00 or approximately $146.00 per acre and that the lands involved in the present suit were worth "x x x greatly

(Continued)

its said answer has further disclosed the name and identity of its lessor, which the state law requires complainants to make parties to this case or that the suit should be dismissed." On September 14th defendant also filed opposition to the motion for summary judgment for the reasons (1) there was no jurisdiction of the subject matter, the value of the property involved not exceeding the sum of $3,000, (2) the affidavits and documents tendered by plaintiffs "were irrelevant and immaterial to any issue in the case x x x", (3) the record "affirmatively shows an indispensable party has not been brought into the action", (4) the records do not "disclose a justiciable controversy as to the ownership of the property", and (5) for these reasons "a motion for summary judgment is not authorized by Rule 56 of the Rule of Civil Procedure."

On the same day, September 14th, plaintiffs filed a motion to amend the complaint "in order to more fully show diversity of citizenship between all plaintiffs and defendant" as a basis for jurisdiction, disclosing plaintiffs were citizens of Louisiana, Massachusetts, Illinois, Iowa

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[3] (Continued)
in excess of the sum of $3,000.00."

A third affidavit dated August 10, 1954 was by one Peter A. Huth, Manager of the New Orleans District of the Department of Conservation in charge of its records, that neither well No. 3 nor 4 on State lease No. 195, which embraces Sections 22 and 27, have been plugged or abandoned. Finally a certificate by T. M. Minefiele, Chief Engineer for the Department of Conservation, listing reports and attaching copies filed by defendant, Gulf Refining Company, through December for each of the years 1951, 1852, 1953 and 1954, this suit having been filed on June 17, 1954.

Plaintiffs also filed as part of its proof in support of its motion for summary judgment a "relinquishment" or "quit claim" to the State by the distributees of the assets of the Southern Sulphur Corporation, Defendant's assign, "all of their rights whatsoever in Sections 22 and 27, Township 19 South, Range 18 East." The document was dated July 23, 1954 or more than a month after the filing of its answer by the Gulf Refining Company, defendant.

On August 31, 1954 plaintiffs obtained from the court an order granting them leave to file all these documents in support of their motion for summary judgment, together with copies of the plats of said township by L. N. Polk and J. C. DeArmas, Civil Engineers, embracing the property sued for.

and California, while defendant is a corporation under the laws of Delaware.

In this state of the pleadings, the motion for summary judgment and for its dismissal were heard together September 15, 1954, complainants offering the affidavits and other documents attached to their pleadings (foot note No. 3) and calling attention to the various allegations in the complaint and answer, including especially the copy of the release and reconveyance by defendant to its lessor, Southern Sulphur Corporation, and the latter's stockholders, executed July 8, 1954, the day preceding the filing of the answer.

The matter was discussed at some length by opposing counsel and the Court, parts of which are quoted in foot note.[4] The case was taken under advisement on the same day by the judge below and, on March 28, 1955, without opinion, he gave judgment in favor of plaintiffs, recognizing them "x x x to be the owners of the lands described in plaintiffs complaint and removing and an-

[4] (Page 34 of the Record)

"Mr. Evans: (Attorney for Gulf Refining Company) May it please the court, opposing counsel has in my opinion, omitted the most salient feature of this case—the discussion of it. This case—In the first place, he designates this action as an action to assert title and to eject trespassers and a study of those, the allegations contained in that complaint do not make it clear as to whether he is asserting his ownership as such or whether he is asserting that defendant is in illegal possession. He makes both allegations it's true, but as to what is the real issue in this case—

Now as lessee, this defendant in answering this petition, when it came to the allegations contained in article IV where he asserts petitioners as owners holding under one John Beckwith whom they acquired by patent No. 1965 from the State of Louisiana these lands by its inherent sovereignty and then six thousand four hundred and thirty nine acres, he doesn't—the defendant was put in this position, *not claiming to the land it had no right to assert ownership; it had no right to take the affirmative as to any rights and assert any rights on behalf of its lessor.* Now, in article— *In answering articles 13 and 14, the defendant sets out very clearly that he has exercised possession over this property some*

(Continued)

nulling, *as against defendant* Gulf Refining Company, any claim or pretensions in and to any portion of said lands adverse to plaintiffs title."

Defendant appealed and charges the following errors by the Court below:

(1) Holding that the subject matter in controversy exceeded $3,000.00;

(2) Holding that defendant's lessor was not an indispensable party and failing to sustain defendant's Motion to Dismiss;

(3) Holding that there was no genuine issue as to any material facts;

(4) Holding that the record disclosed a justiciable controversy of which the Court could or should take cognizance; and

(5) Holding that plaintiffs proved their ownership to the property described in the petition, and failing to hold that the proof showed the ownership of the property to be vested in the State of Louisiana.

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[4] (Continued)
months, as a matter of foct beginning some 21 months before, or 27 months before, and that its possession had ceased some months prior to the filing of this suit. (Emphasis supplied)

Now as a lessee—

THE COURT:

Well now how can it say that? How can it allege that when they had structures with signs on it saying that it's their property? It's still on the property.

MR. EVANS:

Your Honor, this counsel has stated that was in—these structures were in water. A question of Navigation is involved. Those structures are there under the requirements of the Federal Government pertaining to navigation and have nothing to do with the plaintiff's claim here as against us or our possession of the property.

THE COURT:

Have you read the affidavit?

MR. EVANS:

Yes, sir.

THE COURT:

You mean to say a well with a Christmas tree on it is an aid to navigation?

(Continued)

ALLEGED ERROR NO. 1

As stated complainant offered the evidence documentary and affidavits above described in foot note No. 3 along with the pleadings. The value of the lands claimed by plaintiffs we think were thus proven, and appellant offered no evidence to the contrary. Defendant admitted it had drilled wells and removed oil from Sections 22 and 27 and that its producing structures were still on those sections bearing placards proclaiming its ownership at the time of the trial. It was also made clear that defendant's attempted release back to its alleged lessors of the lands in Sections 22 and 27, was executed between the time the complaint was filed on June 17, 1954 and served, and the filing on July 9th of the answer denying pos-

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[4] (Continued)

MR. EVANS:

No, sir, not at all. No, sir. But that is a matter that we have to take up with the, as far as the issues in this case are concerned, with the U. S. Engineers who supervise those matters.

THE COURT:

No, I don't think so. These people filed affidavits and it is incumbent upon you to file counter-affidavits.

MR. EVANS:

May I make this statement to Your Honor that we do not deny that we have been in possession. We cannot deny, I mean as we appreciate it, that constructively or what is called civil possession was in us at the time this action was filed. As far as that part of it goes—

THE COURT:

I thought you denied possession?

MR. EVANS:

We denied illegal possession, Your Honor, and we show that. We have attached to your answer a release of the lease under which we had conducted these operations in the past.

THE COURT:

I thought you began—At the outset you said that you had been in possession 27 months before this action was filed. It seemed to me that the inference was that you were no longer in possession. Now you say that you admit that you were in possession.

MR. EVANS:

May I say in constructive civil possession but our possession in Louisiana, the possession of the Lessee, is the possession of the "Lessor x x x."

"Now we could not deny that we had at one time exer-

(Continued)

session by defendant. In this state of the record it can scarcely be contended, if the amount in controversy was sufficient to give the Court jurisdiction when the suit was filed, that it was lost by the subsequent attempt of defendant to divest itself of interest in a part of the property. Hence we hold that the court below was correct in overruling the plea to the jurisdiction of the subject matter.

ALLEGED ERROR NO. 2

The appellant's claim of error, (based upon the absence of an indispensable party) is predicated upon the assumption that a lessor-lessee relationship is present in this case. This is not so. True, when the complaint was filed, the appellant had a right to answer, claiming possession as a lessee, and thus to avail itself of the right

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[4] (Continued)
cised possession over this property because of the operations which are admitted and we admittedly conducted, but we are not clear here as to just what the plaintiff is about, speaking about—he can't make out our defense. He is not entitled, under any rule of law, that we've been able to find —as is the matter of fact the jurisprudence in the law is settled that judgment cannot be rendered on ownership declaring the plaintiff the owner when the defendant names someone else and shows that this—the one under whom he claims is—as owner—is not a party to the suit. And having shown that we don't think we have to go any further. But the matter—
THE COURT:
You don't claim at all, do you?
MR. EVANS:
Not ownership. No, sir, not ownership.
THE COURT:
What do you claim?
MR. EVANS:
We claim that we had a lease and that we conducted operations under a lease and that our operations were not illegal. He charged our possession—
THE COURT:
You claim you still have a lease?
MR. EVANS:
Not on the property that's involved here, sections 22 and 27. Of course we had that. *Our lease covered that property up until this action was filed. Yes, sir, and it is our appreciation that as of that time, that would fix the respective —fix the issue as to value, jurisdictional amount and that sort of thing; as of the time the action was filed.*" (All Emphasis Eupplied)

provided by Art. 43, La. Code of Practice, to require that the suit be litigated with its lessor, whomever that might be, and be dismissed from the suit. But the defendant elected not to appear in this action as lessee, but instead denied possession and disclaimed any title to the property in question. In all of the cases cited by appellant in support of its claim that its "lessors" were indispensable parties to the suit, there was in existence an alleged lessor-lessee relationship, whereas here, the record shows that appellant not only disclaimed any right to the land, but effectively re-leased its rights under a lease, and no lessor-lessee relationship exists between the defendant and any other party. It cannot be said that where defendants are not sued as and do not appear as lessees, that the rights granted by Art. 43 of La. Code of Practice can be availed of, or that any rights of any lessor can be affected if the litigation involves none of its lessees. (See *Lawrence v. Sun Oil Co.*, 166 F. 2d 466, for discussion of Art. 43 and indispensable parties).

It is unnecessary to consider alleged errors Nos. 3 and 4 for the reason that they are disposed of by what is said above.

As to alleged error No. 5 we deem it sufficient to say that the court was in error in holding that plaintiffs proved their ownership to all of the property described in the complaint, for here the evidence shows only that plaintiff proved its prima facie title to the lands in Sections 22 and 27 against Gulf who was in possession of said sections but claimed no title thereto.

The judgment will, therefore, be reformed so as to recognize appellees to be the owners of the lands in Sections 22 and 27, Township 19 South, Range 18 East, Plaquemines Parish, Louisiana, as against appellant Gulf

Refining Company, and removing and annulling as against appellant any claim or pretensions in and to any portions of said lands, adverse to appellees' title; and, as reformed, it will be

AFFIRMED.

A True Copy:
Teste:

s/ JOHN A. FEEHAN, JR.
Clerk of the United States Court of
Appeals for the Fifth Circuit.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15622

GULF REFINING COMPANY,
Appellant,

versus

ISAAC R. PRICE, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(February 2, 1956)

Before BORAH and JONES, Circuit Judges, and DAWKINS, SR., District Judge.

DAWKINS, District Judge: Appellees, plaintiffs below, some fourteen in number alleging themselves to be residents of Louisiana, Illinois, Iowa and California brought this petitory action claiming title to several hundred acres of property,[1] in the Parish of Plaquemines,

[1] "Lot 1 of Section 1, Lot 1 of Section 2, Lot 1 of Section 3, Lot or Section 5, Lot 1 of Section 6, Lot 1 of Section 7 and Lot 1 of Section 8, all of Sections 14 and 15, Lots 2, 3, and 4 of Section 17, South Half of Section 18, all of Sections 19, 20, 21, 22, 23, 24 and 25, North Half of North Half of Section 26, Northwest Quarter of Northeast Quarter, Northwest Quarter of Southwest Quarter and Northwest Quarter of Section 27, all of Sections 28, 29, 30 and 32, Northwest Quarter of Northeast Quarter, Northwest Quarter of Southwest Quarter and Northwest Quarter of Section 33 in Township 19 South, Range 18 East in the Southeastern Land District of Louisiana, east of the Mississippi River."

Louisiana, against Gulf Refining Company, appellant, a Delaware Corporation called Gulf. They alleged actual possession by defendant for more than one year, as required by the provisions of the Louisiana Code of Practice dealing with real actions (Articles 5 and 43) and that the value of the property in controversy exceeded the minimum jurisdiction of the court. Their claim of ownership was as " x x x sole and only heirs" of John Beckwith to whom plaintiffs alleged the State had issued patent No. 1965 on November 4, 1874, covering a larger area of several thousand acres belonging to the State at that time by virtue of its inherent sovereignty when admitted to the Union in 1812. The complaint was filed June 17, 1954.

On July 9th following, defendant, appellant, answered denying for want of information, the citizenship of plaintiffs, but admitting it was a corporation under the laws of Delaware. It also denied the value of the property was within the Court's jurisdiction. It responded to other articles of the complaint as follows: That Article IV alleging title in plaintiffs through the patent to Beckwith, duly recorded in the conveyance records, stated only a conclusion of law, which defendant would neither admit nor deny. It then admitted Articles V through XII, wherein plaintiffs' relation to an acquisition under the Beckwith patent, as well as other alleged transfers were recited, but denied possession in itself of the property as charged in Articles XIII and XIV. Defendant then set forth at length its reasons for denial of possession[2] based

[2] "XIII. The allegations contained in Article XIII of plaintiffs' petition are denied and in this connection defendant shows that it is not in actual physical possession of any portion of Sections 22 and 27, of Township 19 South, Range 18 East, Plaquemines Parish, Louisiana; that it acquired a mineral lease designated as State Lease #195 from Southern Sulphur Corporation by instrument dated September 18, 1936, a certified copy of which instrument is attached hereto and

(Continued)

mainly upon its alleged release of all rights which it had formerly held in Sections 22 and 27 as lessee.

Defendant further denied "it has at any time been in *illegal* possession of any portion of Sections 22 and 27, Township 19 South, Range 18, East, Plaquemines Parish, Louisiana", (Emphasis Added) but admitted,

> " x x x it has drilled wells in search of oil on said sections, which wells had been abandoned long prior to the filing of this action, and defendant has exercised no possession over said property since such abandonment." It also averred " *x x x It is not in possession of any portions of Sections 22 and 27, Township 19 South, Range 18 East, Plaquemines Parish, Louisiana, and that it has no interest in said property and is not claiming possession thereof of any interest thereon; and defendant formally disclaims any right to possession of said property or any interest therein.*" (Emphasis Supplied)

Copies of "Defendant-1", "Defendant-2" and "Defendant-3" referred to in answer to Article XIII of the Complaint (Footnote #2) were attached and constitute a considerable portion of the transcript in this case.

On August 24, 1954, plaintiffs moved for summary

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[2] (Continued)
marked 'Defendant-1', which instrument conveys the rights of Southern Sulphur Corporation in *Sections 22 and 27 aforesaid, among other property*: that the successors in interest to Southern Sulphur Corporation are Mrs. Bessie Franzheim, et al, being the transferees in instrument dated November 17, 1953, certified copy of which is attached hereto and marked 'Defendant-2'; that pursuant to the provisions contained in the instrument hereinabove designated as 'Defendant-1' and particularly paragraph VI thereof, defendant has executed a reconveyance of all rights acquired by it under said instrument to the successors in interest of Southern Sulphur Corporation, as they appear from the instrument herein described as 'Defendant-2' and the heirs, successors and assigns of such parties, as more fully appears from instrument dated July 6, 1954, a certified copy of which is attached hereto and marked 'Defendant-3', such reconveyance being limited to the rights acquired by this defendant as aforesaid in Sections 22 and 27 of Township 19 South, Range 18 East, Plaquemines Parish, Louisiana." (Emphasis Supplied)

judgment, contending there was "no genuine issue as to any material fact, all as shown by affidavits and documents hereto attached" and prayed for judgment as demanded in its original complaint. This was followed on August 31st by complainants' motion "for leave to file documents in support of motion for summary judgment," which included among others, a certified copy of patent No. 1965 to John Beckwith covering property in Township 19 South, Range 18 East in Plaquemines Parish, a copy of plat of said township by L. N. Polk, Engineer and copy of plat of the same township by J. C. DeArmas, embracing the property sued for and other documents.

Thereafter, on September 8, 1954, Defendant moved to dismiss the motion for summary judgment, again averring as in its answer of July 9 that " x x x such possession as defendant has had of the property in controversy has been in the capacity of lessee, and defendant in its said answer has further disclosed the name and identity of its lessor, which the state law requires complainants to make parties to this case or that the suit should be dismissed." On September 14th defendant also filed opposition to the motion for summary judgment for the reason (1) there was no jurisdiction of the subject matter, the value of the property involved not exceeding the sum of $3,000, (2) the affidavits and documents tendered by plaintiffs "were irrelevant and immaterial to any issue in the case x x x", (3) the record "affirmatively shows an indispensable party has not been brought into the action", (4) the record does not "disclose a justiciable controversy as to the ownership of the property", and (5) for these reasons "a motion for summary judgment is not authorized by Rule 56 of the Rule of Civil Procedure."

On the same day, September 14th, plaintiffs filed a

motion to amend the complaint "in order to more fully show diversity of citizenship between all plaintiffs and defendant" as a basis for jurisdiction, disclosing that plaintiffs were citizens of Louisiana, Massachusetts, Illinois, Iowa and California, while defendant is a corporation under the laws of Delaware.

In this state of the pleadings, the motion for summary judgment was heard September 15, 1954, complainants offering the documents attached to their motion and calling attention to the various allegations in the complaint and answer, including especially the copy of the release and reconveyance by defendant to its lessor, Southern Sulphur Corporation, and the latter's stockholders, executed July 8, 1954, the day preceding the filing of the answer. The matter was discussed at some length both by opposing counsel and the Court, was taken under advisement by the judge below and, on March 28, 1955, without opinion, he gave judgment in favor of plaintiffs, recognizing them "x x x to be the owners of the lands described in plaintiff's complaint and removing and annulling, *as against defendant* Gulf Refining Company, any claim or pretensions in and to any portion of said lands adverse to plaintiffs' title." (Emphasis Supplied)

Defendant appealed and charges the following errors by the Court below:

(1) Holding that the subject matter in controversy exceeded $3,000.00;

(2) Holding that defendant's lessor was not an indispensable party and failing to sustain defendant's Motion to Dismiss;

(3) Holding that there was no genuine issue as to any material facts;

(4) Holding that the record disclosed a justiciable

controversy of which the Court could or should take cognizance; and

(5) Holding that plaintiffs proved their ownership to the property described in the petition, and failing to hold that the proof showed the ownership of the property to be vested in the State of Louisiana.

ALLEGED ERROR NO. 1.

The complainant alleged a value exceeding $3,000, and supported it by affidavits and other documentary evidence, all of which were filed at the trial of the Motion for summary judgment under express order of the Court. Defendant offered no evidence, although the documents referred to and attached to its answer and motions were a part of the pleadings. The lands claimed by plaintiffs consisted mainly of water bottoms or submerged property, as to the value of which there was no other proof than that offered by plaintiffs. Defendant admitted it had drilled wells and removed oil from Sections 22 and 27 among other lands claimed by complainants, and that its derricks with placards thereon proclaiming its ownership, were still standing on the property in dispute at the time of trial. It was also made clear that defendant's attempted release back to its alleged lessors of the lands in Section 22 and 27, was executed between the time the complaint was filed on June 17, 1954, and the filing of the answer denying possession by defendant on July 9th. In this state of the record it can scarcely be contended that, if the amount in controversy was sufficient to give the Court jurisdiction when the suit was filed, it was lost by the subsequent attempt of defendant to divert itself of interest in a part of the property. Hence we hold that the Court below was correct in overruling the plea to the jurisdiction of the subject matter.

ALLEGED ERROR NO. 2.

This alleged error raises the most serious issue in the case, i. e., was the original lessor, the State, an indispensable party to this action involving the title of the land? At the threshold the Court below found, according to the pleadings and "Defendant-3" referred to in the answer to Article XIII of the complaint (Footnote No. 2), defendant had divested itself of all claims and interest in Sections 22 and 27, immediately before answering as to which it claimed and could claim nothing, not even lawful possession.

Appellees concede that a petitory action must be brought by one out of possession against the actual possessor, if it has continued for more than one year, and that if such possession be as lessee, ordinarily he can relieve himself from further defending the title by revealing the name and address of his lessor (Art. 43, La. Code of Practice), but, in the present case, they contend Gulf lost that right by releasing and reconveying the leasehold to its lessors or assignors, who, themselves were only lessees. In this situation appellees say the Court had no alternative but to recognize their title, which on its face (a patent from the State) was good against defendant. They further concede the judgment below is binding only against Gulf, and that neither the State nor anyone else not parties to this suit, are deprived of the right to sue appellees in a direct action to test their claims to the property.

It will be noted by reference to "Defendant-1", attached to appellant's answer, the original assignment or sublease by Southern Sulphur Corporation to Gulf, dated September 18, 1936 embraced large areas in Plaquemines, LaFourche and Jefferson Parishes, which included lands

claimed by plaintiffs other than Sections 22 and 27, Township 19 South, Range 18 East, Plaquemines Parish, Louisiana. No explanation is given for the release of these two sections, from which appellees' counsel, in oral argument, charged without denial, Gulf had withdrawn many thousands of dollars worth of oil.

As stated earlier, the State, if it has any rights, has lost nothing and if it sees fit to sue the plaintiffs in this case for recovery of the property involved, issue can be joined and determined in a manner that will be binding upon all concerned.

In *California Company vs. Price, et al*, 225 La. 706, 74 So. 1, wherein these same appellees in a case to which the State was a party, were held to be the owners of *other portions of the lands covered by the patent to Beckwith of 1874*. In that case, the Supreme Court of Louisiana held the State was barred from attacking the patent by Act 62 of 1912 (L.S.A. R.S. 9:5661 et seq.) which it declared to be a statute of repose against all persons, including the State. Of course, that was a concursos proceeding between the State, the present appellees and others, but in order to find for these heirs of Beckwith it held the patent immune to attack by prescription of six years by the State under this statute.

In the present case, the defendant knew, of course, appellees could not make the State a party to any suit without its consent, and could never quiet their title against the sovereign as long as it claimed ownership of the fee and declined to submit itself to the jurisdiction of the Courts. They also knew that the State was prohibited from divesting itself of the fee to the beds of streams and other navigable bodies of water by the Constitution of 1921 (Art. VI Section 2), adopted after the

issuance of the Beckwith patent in 1874. Most of the cases cited by appellant, wherein it was held that the claimant of the fee was an indispensable party, were between private litigants and did not present the impossible situation with which appellees are confronted here. As pointed out in those cases the basic reason for declining to determine title against an absent claimant, is that it would open the door for fraud between lessees or other possessors holding under the true owner, and third persons. Here, however, if the contentions of the appellant were sustained, in the state of this record, a greater injustice might result. If the State should refuse to raise the question of its title in a proper action, we know of no way in which appellees could find relief, except by proving a valid title based upon a patent, against those in possession under the lease from the State with only a color of right, treating them as trespassers, as has been done in other instance where the sovereign declined to become a party. If such relief were not available, the true owner might be compelled to stand by and see his property denuded of large values of oil, timber, etc., without recourse, which would amount to a taking of his property by the State, not for a public purpose for which it would have to pay under both the State and Federal Constitutions, but for purely private profit.

In *Dreux, et al vs. Kennedy, et al* 12 Robinson (La. Reps.) 489, 504, the legal complications were substantially the same, as here, except there The United States was the alleged owner, who could not be sued without its consent yet the persons sued contended it was an indispensable party. The case was for this reason dismissed below, but on appeal that judgment was reversed, and Justice Bullard, as the organ of the Court made a careful analysis of the circumstances, as well as the origin and history

of title actions. The property in dispute was, at the filing of the complaint, in possession of agents of the United States as a branch mint. Plaintiffs claimed prior title under their ancestors and brought the suit against the officers or employees in actual possession, under a donation from the City of New Orleans made in 1835, approximately ten years before the action was commenced. The defendants' motion to dismiss alleged that having revealed the United States as the owner as required by Art. 43 of The Code of Practice, and it being impossible for plaintiffs to implead the Government, the trial court could do nothing but dismiss the suit. In disposing of that contention, the Supreme Court of Louisiana (Pages 501, 503) said:

> "It is quite clear, that the United States cannot be sued in any court as a party defendant on the record; but it appears settled that in the other States, actions may be brought and maintained against public officers, when the government alone is a party in interest; and this is particularly the case in actions of ejectment. In the opinion of the Supreme Court of the United States in the case of Wilcox v. Jackson, to which we shall have occasion to recur again for a different purpose, it is said by Mr. Justice Barbour:
>
> 'This then being the case, and this suit having been in effect against the United States, to hold that the party could recover as to them, would be to hold that a party having an inchoate and imperfect title, could recover against one in whom resided the perfect title.'
>
> "Thus the decision of that case, which was an ejectment against an officer of the army holding under the United States, turned upon this distinction; that although by the law of Illinois a certificate of purchase and a patent certificate, without a patent, (inchoate titles), were sufficient to

maintain an action of ejectment in relation to lands severed from the domain, and in ordinary cases, yet when the action is against one holding under the United States, and the government is substantially a party in interest, *a recovery could not be had without a patent; and the plaintiffs failed because no patent had ever issued, and the legal title was in the United States.* In that case the judgment in the State court was for the plaintiffs, and the United States, regarding their officer as a mere nominal party, prosecuted the writ of error themselves. No question was made as to the form of the action. The court held that:

'Whenever the question in any court, State or Federal, is whether a title to land which had been once the property of the United States has passed, that question must be solved by the laws of the United States; *but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the State is subject to State legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.*' 13 Peters, 498 [10 L. Ed. 264].

The rule which governs actions of ejectment at common law appears to be, that after service of the ejectment, which is upon the tenant in possession, the defendant should, in case he means to defend the title, appear and confess lease, entry and ouster, which brings the title only into issue. Where the tenant has not given notice to his landlord, which he is bound to do in England under severe penalties, and there is judgment against the casual ejector, the court will set aside the judgment on the landlord's entering into the usual rule to try the title; or the landlord may bring a writ or error, which will be a supersedeas of the proceedings. Espinasse's Nisi Prius, 443.

That the jurisdiction of a State is coextensive

with its territory and its legislation, except where it has consented to part with any portion of it under the constitution of the United States, is a proposition which cannot be combated. It applies to every portion of its soil, which has been severed from the public domain. [People v. Godfrey] 17 Johnson [N. Y.] 233. Sergeants' Constitutional Law, 266 [Wilcox v. Jackson] 13 Peters, loco citato [498, 10 L. Ed. 264]: [United States v. Cornell] 2 Mason, 60 [Fed. Cas. No. 14,867].

In the case of an illegal taking of property by an officer acting under the authority of the United States, and for the use and benefit of the government, we do not doubt but that an action would lie against the officer, or agent, of the United States, although the party in interest would be the United States. In such cases jurisdiction is neither given nor ousted by the parties concerned in interest, but by the relative situation of the parties named on the record.

'If,' says the court in Osborn v. The Bank of the United States:

'The person who is the real principal, the person who is the real source of the mischief, by whose power and for whose advantage it is done, *be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say, that the law could not afford the same remedies against the agents employed in doing the wrong which they would afford against him, could his principal be joined in the suit.*' 9 Wheaton, 738 [6 L. Ed. 204].

In the case of United States ex rel. Stokes et al. v. Kendall [Fed. Cas. No. 15,517] that officer had no personal interest in the matter, and the amount to be allowed was to be paid out of the treasury of the United States.

Upon the whole we conclude, that, if, when the party in possession, who is sued in such an

action points out the owner under whom he holds, he is bound to defend the action, if such owner does not live in the State, and is not represented in it; still more should be so, when such proprietor, lessor or principal is the United States, against whom no direct action can be brought. If it were not so, the clearest right might be defeated, and the party suing be without remedy. The court, therefore, in our opinion erred in sustaining the exceptions." (Emphasis Supplied)

Alleged errors Nos. 3, 4 and 5 are more or less covered by what has been said in disposing Nos. 1 and 2 and we do not deem it necessary to discuss them separately. Suffice it to say that as held by the Court below, plaintiffs have proven their title as good against Appellant, and the judgment appealed from is.

AFFIRMED.

A True Copy:
Teste:

s/ JOHN A. FEEHAN, JR.
Clerk of the United States Court of
Appeals for the Fifth Circuit.